

UNITED STATES OF AMERICA
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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IN RE: NATIONAL PRESCRIPTION
OPIATE LITIGATION

THIS DOCUMENT RELATES TO:

All cases

Case No.

1:17-MD-2804

Honorable

Dan A. Polster

- - - - -

TRANSCRIPT OF PROCEEDINGS OF ZOO FORMAT
HEARING BEFORE JUDGE DAN A. POLSTER, JUDGE OF
SAID COURT, ON MONDAY, JANUARY 11TH, 2020,
COMMENCING AT 5:00 O'CLOCK P.M.

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Court Reporter:

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1 P R O C E E D I N G S

2 THE COURT: This is a video motion hearing,
3 an MDL, the opioid MDL, 17MD2804 on the PEC's motion to
4 take a trial preservation deposition of one of their
5 experts, Dr. David Kessler. It was filed last week.
6 There were responses.

7 There was a reply, and there was a request
8 by the manufacturing Defendants to have oral argument. I
9 generally don't have oral argument on motions. I decided
10 to grant that request here. I don't need anyone to argue
11 what they wrote. I can read.

12 I read very carefully, looked at the cases,
13 but the reason that I granted the request was that I have
14 a number of questions that I need to have answered so I
15 can make an informed decision.

16 So I will answer the questions, and then
17 after we have that discussion, then, if counsel want to
18 add anything at the end, that's fine.

19 All right. I am first trying to determine
20 as best as I can tell from looking at Dr. Kessler's
21 report -- it is a 300-page report. I didn't read it
22 exhaustively but I skimmed it -- it appears that he is
23 being offered as a trial witness against only
24 manufacturers and not distributors and pharmacies.

25 Is that correct?

1 MR. LANIER: Your Honor, Mark Lanier. I
2 will be arguing for the Plaintiffs for most of this.

3 That is not. We are looking to take his
4 deposition in the broader scope of the MDL, and that
5 means that he has got some opinions that he offers, that
6 will be relevant applying across the board beyond just
7 the manufacturers.

8 I am talking specifically about his opinions
9 on what is the responsibility of the FDA, what does it
10 matter whether or not people follow what the FDA
11 regulations? What's the role of the FDA in monitoring
12 this stuff? What does it mean to promote opioid usage
13 through key opinion leaders? What does it mean to do it
14 through front (sic groups.

15 So he has a swath of generic testimony that
16 would be relevant, regardless of who the Defendant is.

17 THE COURT: Okay. On a related question
18 then, Mr. Lanier, is this testimony you are seeking to
19 preserve generic across the board? Is anything that
20 Dr. Kessler is going to say tied to any particular
21 Plaintiff or Plaintiffs.

22 The Plaintiffs in this case, of course, are
23 cities and counties. And in state cases they are states
24 as well as cities and county.

25 MR. LANIER: What we are seeking to offer

1 here is generic testimony that would apply to most any
2 Plaintiff, whoever wanted to play it in their case,
3 assuming, of course, that it meets the requirements of
4 the particular jurisdiction and all of the accouterments
5 that go along with it.

6 But this is generic. It is not specific for
7 one of the counties like CT3 or San Francisco or Chicago,
8 one of the remanded cases or any of that. It is across
9 the board.

10 THE COURT: All right. As I understand it,
11 Dr. Kessler is co-chair of the Biden transition team's
12 COVID response, something like that. Is that right,
13 Mr. Lanier?

14 MR. LANIER: Yes, your Honor. He is the
15 COVID-19 Advisory Commission Co-chair.

16 THE COURT: All right. The Biden transition
17 is going to end, I believe, at noon next Wednesday when
18 President-Elect Biden becomes President Biden. There
19 will be no more transition. At that point, there is a
20 Biden Administration.

21 MR. LANIER: Yes, your Honor.

22 THE COURT: Is. Kessler's role as COVID-19
23 Advisory Commission co-chair planned to continue past
24 noon on Wednesday, January 20th?

25 MR. LANIER: Your Honor, I personally spoke

1 with Dr. Kessler on this very subject in anticipation of
2 your question. So I am giving you the best answer that I
3 can. I understand my ethical requirement of candor to
4 the tribunal, which, whether it was required or not, I
5 would certainly always want to give you. And that
6 requires me to answer this very carefully.

7 I do not know what President-Elect Joe
8 Biden will do when he becomes president, but I do not
9 want to disinform this Court; I believe based upon
10 information and belief, without with divulging any
11 announcement or fanfare that may come forward, that as of
12 noon on January the 20th, we will find that Dr. Kessler
13 is tasked with a job that is every bit as time consuming
14 but is not of an interim nature.

15 I think that's the best way I can answer the
16 question at this point in time, your Honor.

17 THE COURT: All right. I believe, based on
18 what I understand of the law, that a full-time Government
19 -- federal government employee may not act as a private
20 pay -- as a paid expert for parties in private
21 litigation. You work for the Government. You get a
22 salary.

23 You can't -- and you can't use the
24 imprimatur of the Government to weigh in on behalf of any
25 private litigant. I believe if Dr. Kessler or anyone

1 else, me, for example, I can't testify as, you know, as
2 an expert in any private litigation.

3 So -- and I also have serious doubts as to
4 whether if a person cannot testify as an expert in a
5 trial because he or she is a full-time federal government
6 employee, whether that person's prior deposition can be
7 substituted in lieu of live testimony for exactly the
8 same reason.

9 And what everyone was dancing around with or
10 hinting in pleadings was whether the Plaintiffs' concern
11 that Dr. Kessler will be unavailable is because he will
12 have a new position, a full-time position in the Biden
13 Administration.

14 It wouldn't be a question of him just being
15 busy; he wouldn't be allowed to testify, period, because
16 he is a Government employee. So is that what we are
17 talking about here?

18 MR. LANIER: Yes and no, your Honor. That
19 is a very real concern.

20 The yes part is, that's a very real concern,
21 that Dr. Kessler will have a full-time Government
22 position effective noon on January 20th.

23 The no part of it, your Honor, while he
24 can't do moonlighting and get paid as an expert while he
25 is working for the Government, he certainly is able to

1 give a deposition now, which then a determination can be
2 made whether it can or cannot be used later.

3 And my understanding of the law is that we
4 would have to ask permission of DOJ or whomever is
5 overseeing the work of Dr. Kessler once he has a
6 full-time position if such does arise. We would have to
7 seek their permission for it to be played.

8 He certainly could not start moonlighting
9 and get money on the side.

10 By the same token, if he is a full-time
11 employee as the Court has seen over and over again with
12 our Toohey depositions that have been taken, we still
13 have an opportunity to depose someone with the Government
14 with testimony but not pay them for it in the process.

15 And so our view of this is, you have got an
16 MDL. Right now it is in your care, custody, and control
17 to oversee this discovery. We think that it is highly
18 likely that we will be allowed to play this in some way,
19 shape, form fashion in the future. If we cannot, we
20 cannot.

21 But at least if we've got it in the bag, we
22 have got an ability to have it should we be legally
23 allowed to play it, should the Justice Department allow
24 us to play it, or can Dr. Kessler transfer from that job
25 to another job but has lost the ability to do this kind

1 of work for some reason or another, whether he goes --

2 THE COURT: All right.

3 MR. LANIER: These --

4 THE COURT: First of all, any Government
5 employee, if he or she has stacked testimony, available
6 can be deposed. You have to go through the Toohey
7 regulations, but that's as a fact witness. You cannot
8 exempt in any way, shape, or form -- I am not exempt.

9 If someone thinks I have facts relevant to
10 litigation, they can call me as a witness. All right.
11 Same with Dr. Kessler if he is a Government employee.

12 It is being an expert on behalf of a party
13 that is totally different.

14 All right. Look, I had no idea, one, I
15 don't know what -- if Dr. Kessler is going to have a
16 position -- and I have no idea exactly what the law is --
17 obviously, there is a great concern about using one's
18 position directly or indirectly on behalf of a private
19 litigant, and so that really is -- that's what I thought
20 this was about.

21 And everyone was dancing around because
22 there is no way -- these trials if and when they happen
23 are between one to four months in length. Mine is one
24 month. The Judge in West Virginia is allowed four for
25 his. Okay. There is no one, no matter how busy they

1 are, that couldn't squeeze away a couple hours sometime
2 within one to four months to testify, particularly since
3 the Judge could probably let someone who is super busy
4 and out of town testify by video. It has been done. It
5 is no big deal.

6 So that's what we are talking about, is that
7 Dr. Kessler -- there is a good chance he will become a
8 full-time Government employee, and he would no longer be
9 able to give testimony as an expert.

10 And the question is, if he had already given
11 it and it was preserved, it might or might not be able to
12 be admissible under some circumstances. So that's what
13 we are talking about.

14 So it is sort of what I thought, but -- it
15 would have been a lot better if, candidly, the Plaintiffs
16 had just said that. Okay? And that that's what you were
17 trying to do. I surmised that, but we had a lot of time
18 wasted. All right.

19 Dr. Kessler obviously has prepared his
20 300-page report. Everyone has had it for sometime. He
21 has been deposed in the MDL. He has been deposed in the
22 New York litigation that Judge Gargiulo is overseeing,
23 and I guess he gave fry (sic) testimony as well.

24 Is his trial testimony, trial preservation
25 testimony going to be based exclusively on the expert

1 report that he has prepared and submitted to everyone?

2 MR. LANIER: Yes, it is, your Honor.

3 THE COURT: All right. So then potentially,
4 Mr. Lanier, if Dr. Kessler could be a witness in my
5 trial, if he is -- I mean, my trial, my October trial
6 Track 3 is just pharmacies, and you said it is possible
7 he could give generic testimony. It is not tied to
8 Trumbull or Lake County but testimony on the
9 responsibility of the FDA and FDA regulations, et cetera.

10 Is that correct?

11 MR. LANIER: That is correct, your Honor.

12 THE COURT: All right. Well, what I need to
13 hear then -- well, it is really from the Defendants. I
14 need to know if Dr. Kessler's trial preservation
15 testimony is based exclusively on his report about which
16 he has already been deposed in this MDL and in the New
17 York State case, what, if any, prejudice there would be
18 to the Defendants if I direct that his trial preservation
19 testimony be taken Wednesday?

20 And I guess he said that he is available
21 Wednesday.

22 MR. LANIER: That's correct, your Honor.

23 THE COURT: That's where the Wednesday came
24 from.

25 MR. LANIER: Yes. Your Honor, I say that

1 because there was another date that he might have had
2 available. We tried to pick the latest date we could,
3 but there is another case where they are doing this exact
4 same thing with him and taking his deposition on January
5 18th. So our only shot is the 13th. I looked for any
6 other advisable date.

7 THE COURT: Okay. So I guess I need to hear
8 from the Defendants about any prejudice.

9 Again, we are not deciding whether or not
10 this deposition would be admissible in my case, Track 3
11 in the West Virginia trial that is set for May, and any
12 of the other MDL cases that exist now or in any future
13 MDL case or any state case.

14 The admissibility, I am not even hearing
15 argument on that. That's down the road and will have to
16 be decided by the Judge who is presiding over any trial
17 over which the Plaintiffs seek to admit the deposition.
18 I'm only deciding whether or not the Plaintiffs can take
19 Dr. Kessler's deposition on Wednesday.

20 So I would like to hear from any of the
21 defense counsel who want to speak to that.

22 MS. WELCH: Understood, your Honor, Donna
23 Welch from Kirkland, the Allergan Defendants. And I will
24 take the lead in the first instance for the manufacturing
25 Defendants, though others may choose to weigh in.

1 Plaintiffs have known about the appointment
2 of Dr. Kessler to the transition task force since
3 November 9th. They have known since middle of November
4 about, at least, the rumors that he was on the short list
5 to be considered to be appointed for FDA Commissioner or
6 another senior appointment in the Biden Administration.

7 They chose to wait, your Honor, until last
8 Wednesday to notice this motion in the MDL, to notice a
9 deposition presumably in all cases pending in the MDL,
10 and to unilaterally set that deposition for two days from
11 now, January 13th.

12 At a minimum, there is significant and undue
13 pressure and undue burden and unfairness on Defendants to
14 expect us to proceed in less than a week's time to do a
15 cold cross of a causation expert for purposes of trial in
16 a hypothetical case or in every case pending in the MDL.

17 While we have his reports and opinions
18 disclosed in Track 1 and while we have his report in
19 New York, what we don't have is discovery in any of those
20 other jurisdictions that could potentially be used to
21 cross Dr. Kessler.

22 But it goes well beyond that, your Honor.
23 We should be entitled -- the Defendants should be
24 entitled to cross examine Dr. Kessler live with the
25 benefit of his opinions in that case consistent with the

1 rules, with disclosures, with opinions, with discovery in
2 hand live in front of the jury that will be seated to
3 hear a particular Plaintiff's claim, and Plaintiffs here
4 are moving to do this on an expedited emergency basis
5 when no one knows what will happen next week.

6 We don't have a crystal ball, and we
7 certainly don't have an affidavit in support of this
8 motion from Dr. Kessler, but Judge Polster, you made the
9 point better than I could, which is no matter how busy he
10 is, there will certainly be time that he can find to be
11 deposed or to be deposed or to put on testimony at trial
12 consistent with the rules and without putting Defendants
13 in a position where we are asked to cross this witness in
14 a matter of a few days time.

15 Sitting presidents, including President
16 Clinton were deposed while they were in office. The
17 notion that, if he is appointed, he is appointed, he will
18 be immediately confirmed and become so busy that there is
19 not a single day --

20 THE COURT: We have -- Donna, I thought I
21 made clear from my discussion with Mr. Lanier the
22 Plaintiffs aren't contending he will be too busy. All
23 right. They know that if he is a Government employee, he
24 cannot come on the witness stand live and testify as an
25 expert because the first question is "Dr. Kessler, where

1 do you work?" and if he says "I work for the Government,"
2 he is putting the Government, the imprimatur of the
3 federal government on one side or another. He cannot
4 testify as an expert; as a fact witness.

5 But they cannot -- so there seems to be a
6 strong likelihood that as of January 20th Dr. Kessler
7 will become ineligible, not unavailable, ineligible,
8 legally, ineligible to be an expert witness for as long
9 as he holds that appointment.

10 Now, some people hold Government appointment
11 for a long time and some are short. Okay. And who knows
12 when there will be a trial, but that's what we are
13 talking about, and the Plaintiffs believe they would have
14 an argument, that since he is an important witness and
15 there may not be anyone else who can give the kind of
16 testimony that he gave, that if there is a trial
17 preservation deposition, they should be allowed to use it
18 at trial.

19 Now, I am not sure they are right. In fact,
20 I have grave doubts about it just for a whole lot of
21 reasons, and I may have to rule on it. So I am saying,
22 if it is me, I have grave doubts about whether or not I
23 would allow it.

24 MS. WELCH: We do not believe --

25 THE COURT: But I am not deciding that

1 today. I am not deciding that today, and in fact, if it
2 turns out that there would be a whole lot of things that
3 you want and be able to do in cross-examining him when
4 and if that eventuality occurs that you can't do
5 Wednesday, that would be another argument why they
6 shouldn't be allowed to use the deposition, but again,
7 this is all speculation.

8 MS. WELCH: We understand, your Honor. We
9 don't think there is any authority that suggests that
10 they can depose and take testimony of Dr. Kessler today,
11 and if he becomes ineligible on January 20th, then play
12 that testimony. So the property remedy in our view is to
13 wait and see what happens.

14 And if he is eligible as of January 20th or
15 February 20th, there is plenty of time to proceed in a
16 way that does not prejudice Defendants. But to require
17 Defendants to move forward in two days time with a trial
18 cross of this witness under these circumstances, that's
19 patently unfair.

20 The point, your Honor, that he is an
21 important witness that they would like to present, the
22 facts, your Honor are Dr. Kessler has been disclosed as a
23 witness in two of three opioid cases involving the
24 manufacturing Defendants that have preceded to expert
25 discovery, Track 1 of the MDL in New York.

1 In the Orange County case pending before
2 Judge Wilson in California state court, which is a case
3 against it, is manufacturing Defendants' expert
4 disclosures were made in December, and Plaintiffs opted
5 not to disclose Dr. Kessler in that case.

6 It is not as if Plaintiffs can't proceed to
7 trial against the manufacturing Defendants without
8 Dr. Kessler, and if he is eligible and available to
9 testify in a case that goes to trial, that's fair, and
10 that's consistent with the rules.

11 But it is prejudicial and highly prejudicial
12 for Defendants to require us to do a remote trial cross
13 for use in potentially hundreds of cases around the
14 country on two days notice. Plaintiffs have known about
15 this for two months. Plaintiffs could have brought this
16 issue to us and to your Honor before there was a single
17 day that Dr. Kessler is apparently available.

18 We have significant questions whether a
19 deposition of this witness can even be accomplished in a
20 single day. We believe Defendants at a minimum would
21 need a full day with this witness, particularly under
22 these circumstances, and again, the unfairness goes
23 beyond the procedure of, is this witness ineligible to
24 testify? Is he truly unavailable to testify?

25 But the prejudice is a trial cross with less

1 than a week's notice of a key causation expert under
2 these circumstances.

3 THE COURT: Well, isn't it the case -- this
4 has been teed up for several weeks in New York, the exact
5 same issue. So Plaintiffs had raised this with the
6 Defendants in the middle of December. They wanted to
7 take a trial preservation of Dr. Kessler before January
8 20th in the New York case.

9 So we have the same lawyers, the same
10 issues. So everyone has been on notice since the middle
11 of December. The thing is this: If there is no trial
12 preservation deposition and Dr. Kessler is -- gets a
13 Government appointment on January 20th, he is lost to the
14 Plaintiffs as a witness as long as he holds his
15 Government employment. All right?

16 So as long as he is a Government employee,
17 he may not testify as an expert witness in Track 3, West
18 Virginia, New York, anywhere else. All right. We know
19 that. So you can drop him and hire another witness.

20 MS. WELCH: Your Honor --

21 THE COURT: So if he is deposed then and he
22 becomes a Government employee, then if they want to use
23 that deposition, then the Judge presiding over the trial
24 at which they want to use the deposition will have to
25 decide whether or not that deposition is admissible, and

1 I am sure the Defendants will oppose it for a whole lot
2 of reasons. And the Judge will have to decide that.

3 MS. WELCH: Your Honor, that's the status
4 quo. The status quo for all litigants in all cases --
5 and MDL doesn't make an exceptional circumstance -- is
6 that a case goes into discovery and goes into expert
7 discovery, and if a certain expert is available or
8 willing to serve as an expert, that expert can be
9 retained and disclosed under the rules without unfair
10 prejudice.

11 There is no special right because this is an
12 MDL for Plaintiffs to try to use for time immemorial for
13 a witness who may become ineligible, who may become too
14 busy and decide those duties make him not want to serve
15 as an expert or experts.

16 But again, to force a trial cross
17 examination under these circumstances with Defendants in
18 two days is unfair. And yes, we have known since right
19 before the holidays that they wanted to take a trial
20 preservation deposition in New York.

21 There are significant issues with respect to
22 New York, in particular, and discovery that has not been
23 produced in New York that are briefed before Judge
24 Gargiulo. Your Honor, it wasn't until Judge Gargiulo set
25 a hearing with a Defendants' motion to preclude that

1 trial testimony on January 15th, that they rushed into
2 your Honor's courtroom seeking an MDL trial preservation
3 deposition.

4 If they want his testimony for purposes of
5 New York, Judge Gargiulo will decide whether that moves
6 forward, but they waited until the very last minute,
7 provided a single day, two days from now that this
8 witness can be available. It is their motion. There is
9 no affidavit as to unavailability.

10 There is no reason to believe there is not
11 another single time this individual could be deposed,
12 even before January 20th, giving Defendants at least a
13 little more time to prepare. But again, the Plaintiffs
14 don't have some special right to use Dr. Kessler in every
15 case, and in fact, the facts show that they don't want to
16 use him in every case.

17 In the Orange County case they didn't even
18 disclose him. It is not a requirement to go to trial
19 that they have Dr. Kessler. He may become eligible or
20 ineligible. He may be available or -- there is not an
21 emergency that allows them to do trial testimony on
22 Wednesday.

23 THE COURT: Well, there is an emergency if
24 they know he is going to be ineligible on the 20th.
25 That's the emergency. Okay? And whether that -- whether

1 that emergency will let them use a deposition or not, I
2 have no idea, but I do know that the emergency will moot
3 the issue, and they will have to strike him as an expert
4 as long as he is a Government employee.

5 MR. SOLOW: Your Honor, Andrew Solow for the
6 Endo Defendants.

7 Can I address your prejudice question?

8 THE COURT: Okay.

9 MR. SOLOW: Your Honor, you started out this
10 hearing by suggesting there is a report. The fact is
11 that report under your Honor's order, which we looked at,
12 specifically applied only to Track 1. There was a Track
13 1 report. Your Honor raised New York. New York was a
14 New York report.

15 There are references in the Track 1 report
16 to his causation opinions in Track 1; likewise, the same
17 from New York. Mr. Lanier now indicates that Dr. Kessler
18 is offering a, quote unquote, generic opinion. We don't
19 have a report in any case right now in the MDL.

20 Your Honor just issued the manufacturing
21 Defendants are not in it, a case management order for
22 Track 3 with disclosures. There has been no disclosure
23 of that report there, let alone any case that we are in.

24 So why is that prejudice? Because we have
25 not even had an opportunity, even if he serves the same

1 exact report, to depose him on these, quote unquote,
2 generic opinions.

3 And the fact that he doesn't care what
4 evidence there is in any jurisdiction in the 3,000 cases
5 in this MDL, he believes that opioid caused this
6 epidemic. That's prejudice. That's the federal rules.

7 THE COURT: I assume you recognized that in
8 your questioning of him both in Track 1 and in New York.

9 MR. SOLOW: Your Honor, but I get to raise
10 it in any case where he has a report. If the rules say
11 -- the process is report, discovery deposition, so I can
12 ask those questions, not in front of a jury, then I can
13 decide what to ask a jury. You asked --

14 THE COURT: Well, weren't those questions
15 asked in Track 1?

16 MR. SOLOW: About Track 1, and they were
17 asked in New York about New York. Your Honor, I will
18 give you another prejudice example. Mr. Lanier just
19 volunteered that he -- that Dr. Kessler has another
20 deposition in another case. The whole point of one of
21 the rule 26 disclosures is, we get to see where else he
22 is an expert.

23 He doesn't get to lock in stone what he has
24 done and not disclose it to us since, his MDL Track 1
25 report. That's the point, your Honor, there is no

1 report. There is no deposition on these opinions, and
2 there shouldn't be a trial deposition.

3 MS. WELCH: Your Honor, if I could make one
4 more --

5 THE COURT: All right. I would like to hear
6 Mr. Lanier's response to that, please.

7 MR. LANIER: Thank you, your Honor.

8 Several matters I will give the replies to.
9 First of all, the prejudice that was listed first was
10 listed by Ms. Welch. That was the date. The Court on
11 its own argued my position --

12 THE COURT: All right. This idea of --

13 MR. LANIER: Got it.

14 THE COURT: There is no such thing as
15 generic testimony.

16 MR. LANIER: Okay. On that, your Honor, I
17 mean he is just wrong. This is -- the report that has
18 been given for 30 hours of deposition have been given, is
19 exactly what he is going to testify to, and that is part
20 B of the report, the responsibilities under the FDA.
21 That's the report that was on file to you.

22 Part C of the report was whether or not
23 promotion deviating from FDA standards increases the risk
24 of abuse in endangering patient safety. That's the
25 report, and that's what he is going to testify to.

1 Beyond that, the report continues to talk about whether
2 or not involvement with professional medical trade group
3 organizations expands the use of opioids and increases
4 the risk of abuse, and he will testify to that.

5 Those are generic, regardless of who the
6 Defendant is. Those have been the report and the
7 fundamentals from the very beginning. The Defendants
8 have known about this. And this is no different in a way
9 than the genetically modified Rice case that Judge Perry
10 had in Missouri when there was a doctor who had testified
11 -- I can't pronounce his name very well. It is a Greek
12 name. It was Zandonakis.

13 And the Plaintiffs said he is old. He
14 doesn't feel good. He doesn't want to testify anymore.
15 Can we substitute a new expert? She said no, you can't
16 substitute a new expert. Just take his generic
17 deposition to be used in any generic case because they
18 are generic opinions that would apply across the board;
19 that if he doesn't want to testify, so be it.

20 You have still got to prove that he is not
21 available as a witness for some legitimate reason and
22 follow all the federal rules. So I don't see any
23 prejudice here. They have had well over a month to get
24 ready for the deposition.

25 The only reason we applied for it late in

1 your Court is because we realized -- not if the only
2 reason -- any reason why we applied for it late in your
3 Court is because the Judge in New York had set a hearing
4 date on it for Friday the 15th.

5 So the 13th being the deposition date makes
6 it tough to do that hearing and keep that deposition
7 date, which is two days before the hearing.

8 So immediately upon that point, while
9 everybody still had that day locked into their calendar
10 and was already prepping for that day, we noticed his
11 deposition. So we just want to be able to take it.

12 THE COURT: All right. Mr. Solow,
13 Dr. Kessler isn't going to talk about causation in any
14 particular jurisdiction. He is testifying as a general
15 matter that he believes this conduct leads to increased
16 opioid use, and he has said that, and he has been
17 cross-examined.

18 You have been able to take discovery,
19 multiple discovery depositions of him, and you can cross
20 examine him on that in the trial deposition.

21 MR. SOLOW: And your Honor, that opinion in
22 Track 1 was that our marketing and our promotion and our
23 labels caused the opioid epidemic in Cuyahoga County and
24 Summit. And we were entitled to discovery that your
25 Honor provided, and we were entitled to cross examine him

1 on other causes that were in Cuyahoga and Summit County,
2 and we will do the same in the state of New York and
3 Nassau and Suffolk.

4 But you are prejudicing us by having him
5 give these generic opinions not tethered to any case and
6 not giving us the ability to cross examine these opinions
7 with the actual evidence that we are entitled to, in
8 fact, discovery and expert discovery in over 3,000 cases.

9 So your Honor, that is the point, is in any
10 case down the pike, either as a bellwether or on remand,
11 just like in San Francisco and Chicago and West Virginia,
12 there is fact discovery, then expert disclosures, then
13 expert depositions, then if there is a trial.

14 And your Honor, they are putting based on
15 a candidly a madeup unavailability on a week's notice,
16 they are telling us we are not giving you any fact
17 discovery.

18 THE COURT: It is not a madeup
19 unavailability. If the man becomes a Government
20 employee, he is flatout unavailable. It is not
21 madeup.

22 MR. SOLOW: Right. But your Honor, so I was
23 addressing a prejudice point, but you raised a bigger
24 point. How can it not be prejudicial to us that we are
25 going to take his deposition without any fact discovery

1 in the jurisdiction where it is possibly played without
2 any deposition discovery of the opinions in that
3 jurisdiction all because he may not be available.

4 Your Honor, we are going forward on a
5 shotgun schedule for a reason that you just said, this
6 will never see the light of day. He cannot do today or
7 Wednesday what he can't do live.

8 And your Honor, if he is the Commissioner of
9 the FDA or any of the -- to quote Mr. Ianier -- with a
10 prominent position, and he is all over television before
11 jury selection, even after some Judge tells them not to
12 look, you are going to have him on the stand giving
13 opinions when he is taking press conferences from --

14 THE COURT: I agree. Mr. Solow, that's why
15 I said it is very unlikely that there is -- I have grave
16 doubts as to whether if Dr. Kessler is the Commissioner
17 of the FDA next October, whether he can -- whether his
18 deposition, even if I allowed it to be taken, can even be
19 played.

20 MR. SOLOW: Exactly. But I didn't address
21 that, your Honor.

22 In light of those grave concerns, then, you
23 are asking what's the prejudice of going forward
24 tomorrow, and I have given you two solid examples of
25 actual prejudice. We have no discovery to cross examine

1 him for 3,000 cases. We have no expert report.

2 THE COURT: First of all, you wouldn't have
3 -- you are not going to have discovery in 3,000 cases if
4 they call him in West Virginia in May. You are not going
5 to have discovery in 3,000 cases if they call him in my
6 case in October. You will have the discovery you have in
7 that case.

8 MR. SOLOW: Your Honor, I am --

9 THE COURT: Nothing else.

10 MR. SOLOW: My clients aren't in West
11 Virginia. They are not in your case in Track 3. So
12 let's talk about where my clients are: Chicago and
13 San Francisco. Okay?

14 They have cross noticed that, and we will
15 address that and have motions pending there. We are
16 getting case specific discovery there. That's not done.
17 We will get an expert report. We would get an expert
18 deposition. So by letting this go forward, it is doing
19 exactly what I am talking about. So yeah, there may
20 never be 3,000 opioid cases, but there are going to be
21 those four, and this is circumventing the orderly process
22 of the federal rules.

23 MS. WELCH: Your Honor, Donna Welch.

24 Could I make one point about the report
25 because Mr. Lanier in his remarks talked again and again

1 about the fact that we have the report and we were able
2 to depose him on the report.

3 In addition to the fact that the
4 jurisdiction changes, a lot else has changed since the
5 Track 1 report was issued. When Dr. Kessler put in his
6 Track 1 report, two thirds of that report are opinions
7 about Perdue.

8 The vast majority of deposition questioning
9 of Dr. Kessler for purposes of the discovery deposition
10 in Track 1 as a result was by Perdue about his Perdue
11 opinions. And other things changed as well. The
12 Defendants in a case change over time. The claims in the
13 case change over time.

14 Just looking at the examples of the two
15 cases that have been remanded out, MDL, the first thing
16 Plaintiffs did when the Chicago case was remanded out of
17 the MDL was amend their complaint and drop the public
18 nuisance claim.

19 And they are proceeding on other claims with
20 different standards of proof where -- and we believe
21 reliance is required for purposes of all these claims --
22 but where it is clear that reliance by prescribers on the
23 actual statements made is critical.

24 So a lot changes jurisdiction to
25 jurisdiction that is not just discovery. We have a

1 report, but it was a Perdue centric report, literally --
2 my client's name is not mentioned until page 200 of the
3 report. A lot has changed, and the prejudice is immense
4 to move forward, to assume what he is going to say now
5 about my client that hasn't been disclosed.

6 THE COURT: All right. Mr. Lanier, I am not
7 going -- we are not going to drag this on too long. The
8 Defendants are basically saying in this MDL there is no
9 such thing as a generic expert report that can be used
10 anywhere.

11 And so you don't have one, and so you can't
12 take a generic trial preservation deposition of an
13 expert. That's what they are saying, and I understand
14 that argument.

15 What is your response to that?

16 MR. LANIER: My argument is that they are
17 wrong. There are generic arguments that are going to be
18 made in every case.

19 THE COURT: That's different, of course.
20 They are not saying there aren't arguments that can be
21 made against a given Defendant, whether it is Summit or
22 Cuyahoga County or Lake or Trumbull County or the state
23 of New York. You can make some of the same arguments.

24 But what they are saying, there is no such
25 thing as just a generic expert who can render opinions

1 that apply to everyone.

2 MR. LANIER: Well, and I disagree. I think
3 that's exactly what we are offering here with
4 Dr. Kessler, someone who can talk about the role of the
5 FDA, how information about a drug must be truthful, the
6 risks and benefits of the drug must be presented in a
7 balanced fashion, promotional statements --

8 THE COURT: I understand he can make
9 generalizations, but it is only admissible if he ties it
10 to the particular case that is on trial.

11 MR. LANIER: But you Honor --

12 THE COURT: Say you call him next October, I
13 am not going to let him testify unless he says my
14 conclusions apply to the allegations in this case.

15 MR. LANIER: Right.

16 THE COURT: Brought by these two counties,
17 brought by these Defendants. If he testifies in Chicago,
18 he has got to say my conclusions apply to whatever
19 Defendants there are and whatever claims the city of
20 Chicago has brought against them.

21 MR. LANIER: Right. But your Honor, within
22 the framework of that, it doesn't have to apply in a
23 singular fashion in the sense of only this case right
24 here and only this opinion applies here.

25 He can say in the United States of America

1 this is the situation, and that means it is all -- it is
2 a lesser included offense to talk about one county, but
3 it is talking about in a huge -- a national perspective
4 and then becomes relevant in an individual case that is
5 being tried.

6 So it doesn't have to try -- he doesn't have
7 to be the one to offer the opinion specifically to that
8 county. For example, Dr. Linke is another one that we
9 have got who is a generic expert in a lot of ways, and
10 she will talk about the way that opioids work in the
11 brain.

12 Now, opioids don't work in the brain
13 differently in Cuyahoga County or in Trumbull County or
14 in Chicago or in San Francisco. That's --

15 MR. WEINBERGER: Your Honor, can I jump in
16 for just a second and add to that argument?

17 Your Honor, if you go back to your
18 Gadolinium case, just like in every MDL that involves a
19 drug or a product, a medical device, there are experts
20 that offer generic testimony on a lot of issues including
21 causation. They keep calling Dr. Kessler a causation
22 expert.

23 Indeed, that is true, but it is a general
24 causation opinion that applies whether it is Cuyahoga or
25 some county in Utah with respect to how the conduct of

1 the Defendants, the manufacturing Defendants contributed
2 to cause the opioid epidemic.

3 That's -- in every MDL, that is in a
4 parallel situation involving a drug product. You have
5 these generic experts, and then you have experts who
6 testify as to specific causation. That's not -- the
7 latter specific causation is not what Dr. Kessler's
8 testimony is all about;

9 Rather, it is the general nature of how this
10 drug was approved? What is the limitations of that
11 approval? What did the Defendants' conduct do once they
12 got approval? And does the FDA have or not have
13 jurisdiction over those issues?

14 You know, this is not that unusual a
15 situation, your Honor, in the course of this kind of
16 litigation.

17 MS. WELCH: Your Honor, if I could
18 respond --

19 THE COURT: A causation expert is not a
20 specific causation expert. So Plaintiffs have stipulated
21 that he will give no testimony whatsoever that's tied to
22 any city, county or state. So there is no reason to
23 cross examine him based on any evidence you would get.

24 MR. SOLOW: We haven't taken a discovery
25 deposition on that, your Honor. That's the whole point.

1 THE COURT: There was -- there was a
2 discovery deposition.

3 MR. SOLOW: Your Honor, respectfully, there
4 wasn't. Just because they want him now to be this
5 generally causation witness, that's not the facts. The
6 facts are he gave an opinion in Track 1 that was tied to
7 Track 1. Okay?

8 THE COURT: Wait a minute. What did he say?
9 What opinion did he give tied to Cuyahoga and Summit
10 counties?

11 MR. SOLOW: He tied to local call notes,
12 local doctors, and those things, and that's how he tied
13 it home. Okay? He did the same thing in New York.
14 Okay?

15 And now, your Honor, if they --

16 THE COURT: Is that true, Mr. Weinberger and
17 Mr. Ianier, that Dr. Kessler testified about local
18 doctors in Summit and Cuyahoga County?

19 MR. WEINBERGER: Your Honor, he was asked
20 questions -- he had opinions, for example, on what was
21 the methodology that Perdue and these other Defendants
22 used in calling on the doctors.

23 And so he had call notes for certain doctors
24 within the jurisdiction that he reviewed and which
25 supported his opinions about the marketing or improper

1 marketing aspects of the Defendants' conduct.

2 But that is the only real area that was
3 jurisdictional specific, and he testified that, you know,
4 also in general that when you send these sales reps out,
5 this is what happens in general, and these are what the
6 call notes demonstrate is happening in terms of the
7 effective marketing on these doctors.

8 MS. WELCH: Your Honor, things don't happen
9 in a vacuum.

10 MR. LANIER: We are specifically telling you
11 we are not going to be asking county-specific opinions in
12 this case. He has got no basis for giving those. This
13 is not tied to a case.

14 This is an MDL generic expert, and we will
15 be asking the questions that are entirely contained
16 within the confines of his report that had been given to
17 the Defendants and that they have known about forever.

18 Those matters that I read to you just now, I
19 was quoting from the report that he will be answering.

20 MS. WELCH: Your Honor, respectfully,
21 causation doesn't happen in a vacuum, and marketing
22 doesn't cause a result, and conduct isn't unlawful in a
23 vacuum. It is specific conduct by specific Defendants
24 that has or doesn't have an impact in a jurisdiction.

25 I understand what they want to do --

1 THE COURT: Well, he is going to talk about
2 specific conduct, but he is not going to be talking about
3 the impact on any jurisdiction. I wouldn't permit that.

4 So the Plaintiffs have stipulated they will
5 not ask any question of Dr. Kessler directed to any
6 specific jurisdiction, city, county, or state. They will
7 ask him about what the Defendants did.

8 MR. SOLOW: So why don't we, your Honor, get
9 a discovery deposition of these new opinions because they
10 are new. There is no report that they are tethered to.
11 Your Honor, the fact is that Mr. Lanier can put on
12 whatever direct he wants. We are entitled to put on
13 whatever we want.

14 As Ms. Welch said, these do not occur in a
15 vacuum. We spent time because we had a deposition in
16 Track 1 of lining up --

17 THE COURT: All right. Look, I will tell
18 you what, number one, I have grave doubts whether, should
19 it come to pass, that if Dr. Kessler is a Government
20 employee the Plaintiffs will ever be allowed to put his
21 deposition on when they can't call him live for a whole
22 host of reasons. But --

23 MR. SOLOW: So what's the prejudice of
24 waiting?

25 THE COURT: Well, because if he becomes a

1 Government employee, then he is lost as a witness.

2 MR. SOLOW: Right. But if he is not and
3 they were able to use it, then he is available. That's
4 the totality that you are only seeing one way, your
5 Honor.

6 If you are never going to be able to do it
7 after January 20th, why should he be allowed to do it
8 today, like if it can never be played after January 20th.
9 If he is not a future Government employee in ten days,
10 then they have, as your Honor said, they can find any day
11 to do a general causation disclosure. We can have an
12 orderly process.

13 There is no reason it has to happen in two
14 days. That's the point. You talk about the prejudice to
15 us. Where is the prejudice to them? Right? If he is
16 not a future Government employee, they can have
17 Mr. Weinberger, Mr. Ianier, they can roll out their
18 generic causation opinion. We can have discovery. We
19 can have a deposition and --

20 THE COURT: Well, the prejudice is if he
21 does become a Government employee, which is quite likely,
22 he is permanently lost to them as an expert for any trial
23 that occurs while he is a Government employee, which
24 could be several years. All right. That's the
25 prejudice. So --

1 MS. WELCH: And they can use any of the
2 experts they disclosed in Orange County, your Honor, or
3 other experts. That's what litigators do.

4 MS. FEINSTEIN: And your Honor, this is
5 Wendy Feinstein on behalf of the Teva Defendants. I know
6 they are very practical --

7 THE COURT: Let me hear from the Plaintiffs.
8 Are you saying Dr. Kessler is the only person who can
9 testify to what he said in his report and what you want
10 him to testify? There is no one else?

11 MR. LANIER: Your Honor, I have been doing
12 this for a long time. I don't know anyone else who meets
13 his qualifications and can do it -- I mean, he was the
14 head of the FDA.

15 THE COURT: I know he was ahead of the FDA
16 30 years ago, the FDA.

17 MR. LANIER: Right. And he was in that
18 unique position in that time capsule of history to see
19 this unfold. He has both a law degree and a medical
20 degree. So he has got a unique perspective that I don't
21 know of anyone else who has.

22 I think it is an unmatched perspective, and
23 that's why in candor well over a million dollars has been
24 spent. He spent well over 1,500 hours in this case.

25 THE COURT: I know. And much of it is on

1 Perdue, and quite frankly, Perdue pleaded guilty. So it
2 is all relevant. He will not be giving any testimony
3 about Perdue. They are not going to be on trial.

4 MR. LANIER: Yes, your Honor, that is true,
5 but it is still background information that allows him to
6 have a good full understanding of what's going on. I
7 don't know anyone else who has got that.

8 THE COURT: Do you believe you can ask him
9 questions and make it clear that his testimony is not
10 tied in any way to evidence, any particular evidence, in
11 any individual city, county or state, that he is just
12 offering general opinion testimony?

13 MR. LANIER: Absolutely, your Honor. That's
14 all we would be asking him. I will represent that to the
15 Court, and it is -- yeah, absolutely, absolutely.

16 THE COURT: It seems to me if they want to
17 take that deposition, they can, and that's another
18 argument the Defendants can make to any Judge if they
19 seek to use the deposition, that it is not tied to
20 anything, so it shouldn't be admissible.

21 MR. PISTILLI: Your Honor, this is Kristen
22 Pistilli from McKesson and speaking for distributors
23 Defendants today.

24 THE COURT: All right.

25 MR. PISTILLI: I wanted to just briefly add

1 that from the distributors perspective to get back to
2 your question, to the question at the outset of the
3 hearing to Mr. Lanier where I don't think we got an
4 entirely straight answer.

5 The justification for proceeding with this
6 deposition from Plaintiffs' perspective is that these
7 opinions have already been disclosed. They have been
8 subject to discovery in the form of depositions in the
9 New York action in Track 1.

10 As to distributors, that's simply not the
11 case. Dr. Kessler disallowed having any opinions
12 relevant to distributors in the Track 1 case and in the
13 New York case.

14 And so if he is going to --

15 THE COURT: If that's the case, then I will
16 specifically say that his deposition cannot be used
17 against anyone but manufacturers.

18 MR. PISTILLI: In our submission to your
19 Honor, we have given you the excerpts of the deposition
20 transcripts involved in those cases. Says "I don't have
21 any opinions about distributors" and so if he is going to
22 offer opinions about distributors --

23 THE COURT: If that's what he said, then you
24 can't use it against distributors. What did he say about
25 pharmacies?

1 MR. STOFFELMAYR: Judge, Casper Stoffelmayr
2 for the pharmacy Defendants and his -- in his MDL
3 deposition testimony about the pharmacy Defendants was:

4 "Question: You do not have any opinions as
5 we sit here today that you intend to offer with respect
6 to the retail chain pharmacies?

7 "Answer: At trial, no.

8 "Question: You don't have any in the report
9 that you served? Is that correct?

10 "Answer: That's correct."

11 He could not have been clearer --

12 THE COURT: All right.

13 MR. STOFFELMAYR: -- that he was offering
14 any opinions of the pharmacy Defendants.

15 THE COURT: Well, it seems to me based on
16 that and since that's your -- the Plaintiffs' argument
17 that the Defendants have had discovery deposition, that
18 you can't use -- if I allow it, you can't use it against
19 distributors or pharmacies.

20 MR. LANIER: Your Honor, we are not going to
21 bring him in to testify about what a distributor or
22 pharmacy did wrong. I don't think it should be played in
23 that situation.

24 If there are accusations in the trial where
25 the Defendant tries to accuse Perdue and say this is all

1 Perdue's fall or all the manufacturers' fault -- I am not
2 saying the deposition might not become relevant -- but we
3 are not playing him to say "here is what the distributors
4 did wrong," or "here is what the pharmacies did wrong."

5 Those aren't his opinions in his report,
6 and we are going to keep him in the confines of his
7 report.

8 THE COURT: Well --

9 MS. WELCH: Your Honor --

10 THE COURT: If I allowed you to take it, you
11 aren't going to be able to ask any questions about the
12 distributors or pharmacies, and the testimony is not
13 going to be -- if I have anything to do with it, you are
14 not going to be able to offer it against any distributor
15 or pharmacy.

16 MR. LANIER: Understood, your Honor. And we
17 will refrain from asking any of those questions in the
18 deposition.

19 THE COURT: All right.

20 MS. FEINSTEIN: Your Honor, this is Wendy
21 Feinstein on behalf of the Teva Defendants. I am not
22 sure if my mike is working. I tried to jump in a few
23 times here.

24 Just in addition to what Ms. Welch said and
25 what Mr. Solow said about the absence of an operative

1 report and the report focusing on different Defendants
2 who are no longer a part of this case, we are faced with
3 going into a trial examination of a key expert without
4 exhibits, without an exhibit list, some generic sort of
5 examination without even a hint of what documents the
6 Plaintiffs may use, and we have got two days to prepare
7 for this. That's yet another example of the prejudice we
8 are facing.

9 THE COURT: Didn't Dr. Kessler produce -- I
10 mean, I assume he produced everything he was given and
11 used and reviewed to give his report in Track 1, right?

12 MS. FEINSTEIN: Your Honor, he had literally
13 a room of binders with him at his discovery deposition in
14 Track 1; similarly in his New York deposition, there was
15 a room of binders. Many of those things were
16 jurisdiction specific. Many of those things we asked him
17 about with respect to defenses that we have in those
18 jurisdictions.

19 And for us to prepare on such short notice
20 to take a generic trial testimony that could be used in
21 any jurisdiction without the ability to defend in that
22 jurisdiction, without the ability to have some limitation
23 even on the parameters of what documents and exhibits may
24 be used is highly prejudicial.

25 MR. LANIER: Your Honor, to the extent they

1 assert any kind of prejudice there, we will supply them
2 with a list of the documents to be used in the
3 deposition. We will do it before midnight tonight so
4 they have got them. This does not -- there is no gotcha;
5 there is no surprise documents; there is nothing that
6 they haven't deposed him over that is not in his report.

7 This is just standard vanilla, can we please
8 get the guy in the box in case we ever get to use him?

9 MS. WELCH: Again, your Honor, to be clear,
10 when they get him in the box, they are entitled to ask
11 all sorts of generic questions if that's how they want to
12 try to present their case, but the notion that we would
13 be forced to cross examine for purposes -- it is not for
14 purposes of nothing.

15 We are being asked to cross examine for
16 purposes of a trial, and trials like causation don't
17 happen in a vacuum. Some trial is going to happen in
18 some jurisdiction, and what we would do for Allergan is
19 cross examine Dr. Kessler about whether his opinions hold
20 up with respect to our client in respect to the
21 jurisdiction bringing those claims.

22 And we can't do that on Wednesday not
23 knowing what the claims are. Is public nuisance the
24 claim or not? Are we being tried with other Defendants
25 or not? What are the claims? What are their theories

1 against my client, and what happened in the jurisdiction
2 that is suing my client? That's the context of a
3 lawsuit. Lawsuits don't happen in a vacuum. Neither do
4 trial cross-examinations.

5 THE COURT: Well, I agree with that, and
6 that's another reason why I think it is highly unlikely
7 that this deposition ever can be used, but if I don't
8 allow it, then Dr. Kessler is lost as a witness, and he
9 may be the best person, the most knowledgeable person to
10 testify about these things, and that would be a big loss.

11 All right. Defendants are always able to
12 cross examine him, but if he is the best person to
13 testify about the FDA and the role of the FDA, then the
14 jury ought to be able to hear him in whatever
15 jurisdiction.

16 All right. The 13th -- all right, we have
17 got up through the 19th. If I allow this, I don't have
18 to tie it to the 13th. If Plaintiffs want to do it, they
19 can work it out with Dr. Kessler if he wants to do it.

20 Obviously, it can't be the 20th. The last
21 day would be the 19th. The 18th is a federal holiday,
22 but apparently, he has already got something on the able
23 18th.

24 MS. WELCH: And your Honor, to be clear, we
25 absolutely do not believe this deposition can happen in

1 one day, even if Plaintiffs only took an hour to do their
2 generic direct examination of this witness.

3 The Defendants are entitled, particularly in
4 light of the fact that we haven't taken a discovery
5 deposition about these opinions, and a discovery
6 deposition that did happen was largely done by Perdue's
7 counsel, and they are no longer in the case.

8 We have a lot to cover for trial cross
9 examination purposes. We don't think it can be done in a
10 single day, so we think it needs to be two days or, at
11 least, whatever time Plaintiffs need and full day for
12 Defendants.

13 THE COURT: All right. Mr. Lanier, how
14 long do you envision Dr. Kessler's direct testimony to
15 be?

16 MR. LANIER: Three hours max.

17 THE COURT: Well, we have at least -- how
18 many manufacturing Defendants do we have? We have Teva;
19 we have Allergan; we have Endo; we have Johnson &
20 Johnson. Malcroft and Perdue are bankrupt. They are
21 out. So we have got four: Teva, Allergan, Endo, J & J,
22 those entities.

23 MS. WELCH: Your Honor, those are the four
24 that were in Track 1. I can't speak to other
25 manufacturing Defendants that may be named Defendants in

1 other pending cases in the MDL where this deposition
2 theoretically could be played.

3 But we don't believe that four hours is
4 sufficient for four Defendants.

5 THE COURT: I think that's right.

6 MR. LANIER: We will cut ours down, your
7 Honor, from --

8 THE COURT: It seems to me that each
9 Defendant is entitled to two hours if you are taking
10 three. So that's a day and-a-half deposition, at least,
11 so it is -- so I think we need a day and-a-half.

12 MS. WELCH: And your Honor, without
13 obviously waiving any of the arguments we've made in
14 light of the fact that this is -- they are purporting to
15 preserve trial testimony, we believe we need Court
16 supervision of the proceedings in real-time.

17 So I don't know if Special Master Cohen, for
18 example, is available to preside over the deposition for
19 the day and-a-half, but we don't think that this could
20 proceed -- we need objections and issues ruled on in
21 real-time, again not waiving any of our rights.

22 We don't think this should go forward, but
23 if your Honor at the end of the day concludes it will, we
24 believe we need supervision for the deposition.

25 THE COURT: Well, we will provide that

1 between Special Master Cohen and Judge Ruiz and I, again
2 the three of us we will cover it. We will figure it out.
3 We have got two judicial officers on the case plus a
4 special master.

5 MS. WELCH: We would ask, then, your Honor,
6 for the last day and-a-half available before noon on the
7 20th to alleviate what they think is significant
8 prejudice. We don't think it will alleviate it in its
9 entirety or even a lot --

10 THE COURT: I understand that. The
11 Defendants are objecting on the whole thing. All right.
12 So I think that's a fair request. So it will be -- I
13 mean, we could use the 20th. Okay? The 20th could be a
14 half day.

15 MS. WELCH: We agree, your Honor.

16 THE COURT: So we could do it the 19th and
17 needs to wrap up around noon on the 20th. I doubt -- it
18 doesn't have to end quite by 1:00 o'clock. I mean,
19 nothing is going to -- well, some of us might want to
20 listen to what our new President says.

21 So I think we should wrap it up at noon out
22 of respect for the inauguration. So I for one would like
23 to listen to what our new President says.

24 MS. JOHNSON: Your Honor, this is
25 Kristen Johnson. I am counsel to Blue Cross Blue Shield

1 in the MDL, but I am also counsel in the Ranbaxy fraud
2 litigation pending in the District of Massachusetts.

3 And I certainly don't intend to throw a
4 wrench into these proceedings, but because I am
5 listening, I wanted to inform the Court that
6 Dr. Kessler's deposition is being taken in the Ranbaxy
7 fraud case on the 18th and 19th of January.

8 We have noticed it for then, and we are
9 proceeding as such. Obviously, if this Court were to
10 order that Dr. Kessler participate in a deposition in
11 your case, that would affect us, but I did want to share
12 with the Court.

13 THE COURT: Well, I don't know what to do
14 about that. I suppose I can -- has a judge directed
15 that?

16 MS. JOHNSON: No, your Honor, they have not,
17 and without getting too in the weeds because I am sure no
18 one cares about the very particulars, I will say that we
19 are differently situated, and that the scheduling order
20 in our case provides that expert depositions may be taken
21 up to April 23rd.

22 So this is actually pursuant to Court order
23 that it is being taken, at least, in the sense from the
24 Plaintiffs' position. So we have not sought Court
25 permission to do that. We did advise the Court in the

1 Ranbaxy litigation today in a joint status report that
2 there is a dispute among the parties as to whether that
3 deposition should proceed, but as of now, we intend to go
4 forward.

5 Of course, if your Honor makes a ruling --

6 THE COURT: There is a dispute. So it is
7 not clear it is going to happen. It is one thing if the
8 Judge had ordered it and you disagreed and it is actually
9 happening. What you are saying, it might or might not
10 happen?

11 MR. LANIER: Your Honor, one thing that
12 might help, your Honor, is we could do the direct on the
13 13th and then try to find a time to do the cross later,
14 so get that half day done that also helps obviate the
15 concerns of the Defendants of "gee, we don't know what he
16 is going to say, and we don't know what the documents
17 are."

18 Kudos to Hunter.

19 THE COURT: That's not a bad idea,
20 Mr. Lanier. Just do the direct on the 13th, and then you
21 need to find eight hours, so that's one long day. You
22 know, it could even be four hours one day and four hours
23 another day, put it in. All right. That's a good idea.

24 Do the direct on the 13th, and then you got
25 to find eight hours, two for Teva, two for Allergan, two

1 for Endo, and two for J & J over -- by noon on the
2 20th.

3 MR. SOLOW: Your Honor, Andrew Solow again
4 for Endo. If I can just make a request just for federal
5 rule of appellate procedure 8. Your Honor, if you are
6 going to now grant the Plaintiffs leave to take this
7 deposition with the conditions that you've stated, we
8 would ask that you stay the deposition pending the
9 outcome of a petition for a Writ of Mandamus to the Sixth
10 Circuit.

11 THE COURT: You are going to bother with
12 this again?

13 MR. SOLOW: Your Honor, respectfully, if
14 I --

15 THE COURT: Well, do whatever you want. No,
16 I am not staying it. What I am going to do, I am going
17 to do. You want to file for a Mandamus, you are, you
18 know, free to file.

19 MR. SOLOW: Understood, your Honor.

20 In the order that grants the Plaintiffs'
21 motion, could you deny the request for leave to stay for
22 the purpose of --

23 THE COURT: It is denied. I am denying it
24 now. This thing is happening on the 13th. Your cross
25 examination will be done, and again, if Dr. Kessler -- if

1 the Plaintiffs can't find the eight hours, then the thing
2 is moot because if the cross examination isn't done,
3 obviously the deposition can't be played.

4 So if Dr. Kessler says I cannot do it then,
5 the whole issue becomes moot as does the Mandamus. So
6 there is no prejudice from the direct. And obviously,
7 you need to advise everyone as soon as possible, you
8 know, when the -- when it will be since I will have to
9 arrange for supervision by either me or Judge Ruiz or
10 Special Master Cohen, and it will probably be a
11 combination. It may be a combination.

12 MS. WELCH: And your Honor, just for an
13 abundance of clarity, typically how the Defendants have
14 done these depositions in the past is that we use our
15 time collectively. So I assume you are giving Defendants
16 eight hours collectively for purposes of cross
17 examination?

18 THE COURT: If Endo wants to use one
19 and Allergan wants to use three, yeah, you don't have to
20 --

21 MS. WELCH: Thank you, your Honor.

22 THE COURT: -- you don't have to have two
23 hours to the dot. It is collectively. You can --
24 obviously, don't waste time and ask the same questions,
25 so you can use it however you want.

1 And I am doing this, again, I am not in any
2 way ruling on whether this deposition would ever be
3 admissible anywhere, in my cases or anywhere, but
4 Judge Ruiz, was anything you wanted to ask or say?

5 MAGISTRATE JUDGE RUIZ: No, Judge Polster.

6 THE COURT: All right. So again -- and
7 Mr. Lanier, you said by midnight tonight you would give
8 the Defendants a list of the documents you plan to use?

9 MR. LANIER: Yes, your Honor.

10 MS. WELCH: Your Honor, in addition to that
11 -- I'm sorry. It is Donna Welch again.

12 THE COURT: Yes.

13 MS. WELCH: -- in addition to a list of
14 documents and again reserving all of our other rights, we
15 would also ask for invoices through today from
16 Dr. Kessler for his work on the opioid cases generally or
17 any specific opioid case pending in the MDL.

18 To the extent Plaintiffs or Dr. Kessler said
19 he is simply not prepared and submitted invoices, which
20 we have heard in the past in deposing this witness, we
21 would ask by midnight tonight for the amount and the
22 number of hours in total that have been expended,
23 regardless whether invoices have been submitted.

24 And we would like an updated disclosure
25 consistent with the rules of all of the retentions and

1 testimony that he has given again through today.

2 MR. LANIER: Your Honor, in regards to those
3 matters, we would be glad to give them those, but we are
4 going to be pushed by midnight tonight to get the
5 documents. That's just -- that's just the difference
6 between X dollars and Y dollars. If we get those by
7 midnight tomorrow night, if that's okay.

8 THE COURT: All right. That's fine.

9 MS. WELCH: Fine.

10 THE COURT: The documents by midnight
11 tonight and midnight tomorrow the other two, the invoices
12 and the retentions.

13 MR. LANIER: Yes, sir.

14 MR. STOFFELMAYR: Judge, Casper Stoffelmayr,
15 if I can ask one question --

16 THE COURT: Yes, Mr. Stoffelmayr.

17 MR. STOFFELMAYR: -- I notice you didn't
18 allocate cross examination time to the pharmacies or
19 distributors.

20 THE COURT: No. I categorically said that
21 this testimony cannot be offered against pharmacies or
22 distributor.

23 MR. STOFFELMAYR: And I was just going to
24 request that your order make that clear because this
25 could be coming up at any point in the future before any

1 number of other courts.

2 THE COURT: All right. The Plaintiffs have
3 stipulated they won't ask Dr. Kessler for any opinions
4 about what the pharmacists did or didn't do or what the
5 distributors did or didn't do, and the testimony is not
6 going to be offered against them at trial --

7 MR. STOFFELMAYR: Thank you, Judge.

8 THE COURT: -- manufacturers.

9 MR. LANIER: Yes, your Honor, we make that
10 representation on questioning.

11 THE COURT: Okay. Thank you, Mr. Lanier.
12 That will go in the order.

13 MR. PISTILLI: I'm sorry, Mr. Lanier. Did
14 you mean to limit the representation?

15 THE COURT: No. He said he accepts the
16 limitation.

17 MR. PISTILLI: Okay. Thank you. Just
18 clarifying.

19 THE COURT: Okay. I appreciate everyone's
20 participation in this. We had to do it on fairly short
21 notice, and I had a number of questions, and I appreciate
22 the answers. So everyone stay safe. With that, we are
23 adjourned.

24 MS. WELCH: Thank you, your Honor.

25 MS. FEINSTEIN: Thank you, your Honor.

1 MR. LANIER: Thank you, your Honor.

2 (Many said thank you.)

3 (Oral motion concluded 6:25 p.m.)

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5 C E R T I F I C A T E

6 I, George J. Staiduhar, Official Court
7 Reporter in and for the United States District Court,
8 for the Northern District of Ohio, Eastern Division,
9 do hereby certify that the foregoing is a true
10 and correct transcript of the proceedings herein.

11
12
13
14 s/George J. Staiduhar
15 George J. Staiduhar,
Official Court Reporter

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